IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	)	**DEATH PENALTY**
	)	
TAUNO WAIDLA,	)	**CASE NO. S102401**
	)	
Petitioner,	)	Related to Cases:
	)	Direct Appeal No.
On Habeas Corpus	)	S020161
	)	Habeas Corpus No:
	)	S076438
		[Los Angeles Superior Court Case No. A711340]

EXCEPTIONS TO REFEREE'S REPORT & BRIEF ON THE MERITS

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I. INTRODUCTION

The prosecutor who tried both cases intentionally presented inconsistent factual theories in each case to maximize each defendant's culpability. (Referee's Report on Proceeding, Evidence, and Findings of Fact (hereinafter referred to as "Report") at p. 2.)

Tauno Waidla was tried first. (Reporter's Transcript of Reference Hearing Proceedings held on October 28, 2003 (hereinafter referred to as "RHRT") at p. 6.) The prosecutor, Deputy District Attorney Steven Ipsen, argued that Waidla inflicted all the hatchet wounds and the victim died in the living room as a result. (Transcript of Tauno Waidla murder trial (hereinafter referred to as "Waidla RT") at p. 2843.) The prosecutor offered testimony and evidence to help prove that Waidla was the actual killer even though he knew that the co-defendant Sakarias had confessed to striking the hatchet wounds in the bedroom. (RHRT at pp. 57, 100-102, 140.) The jury convicted Waidla of capital murder. (Waidla RT at p. 3126.)

The prosecutor further relied upon Waidla's use of the hatchet "to inflict the chop wounds as a critical point in [Waidla's] thought process," reflecting a decision that made Waidla deserving of a death verdict. (Report at p. 24.) After lengthy jury deliberations, the jury returned a death verdict.

Peter Sakarias was tried second for the same murder. (RHRT at pp. 6-9.) The same prosecutor changed his strategy and no longer asserted that Waidla killed the victim. Instead, the prosecutor argued that Sakarias dragged the victim into the bedroom, where he inflicted all the fatal hatchet wounds. (Transcript of Peter Sakarias murder trial (hereinafter referred to as "Sakarias RT") at pp. 1520-21.) Although the prosecutor now believed that Sakarias chopped off the top of the victim's head, he did not advise Waidla's trial counsel that he had shifted theories to blame Sakarias. (Id. at pp. 47, 59.) The prosecutor refrained from eliciting testimony and introducing evidence that he used at the Waidla trial to prove that Waidla was the actual killer; he offered Sakarias's confession to show that Sakarias was the actual killer. (RHRT at p. 140.) The jury convicted Sakarias of capital murder. (Sakarias RT 2555.)

As the prosecutor had done in the Waidla trial, the prosecutor again used the infliction of the chopping wounds as a factor justifying the death penalty for Sakarias. (Report at p. 24.) The jury also returned a death verdict. (Sakarias RT 2555.)

Consequently, Waidla and Sakarias were convicted of capital murder and sentenced to death based on factually inconsistent accounts of the murder. Both Waidla and Sakarias filed habeas petitions alleging that the prosecutor's pursuit of factually inconsistent theories and arguments deprived them of due process.

This Court ordered a reference hearing, which was held in the Superior Court on October 28, 2003. The referee made the following findings of fact:

(1) Ipsen's argument of inconsistent factual theories was an intentional strategic decision adopted to fit the evidence he presented at the successive trials, to meet the proffered defense theories, and to maximize the showing of each defendant's culpability.

(2) At the time of Sakarias's trial, Ipsen did not believe that the victim, Mrs. Piirisild, was already dead when she was dragged from the living room to the bedroom.

(3) Ipsen deliberately refrained from asking Dr. James Ribe, the medical examiner, about the postmortem abrasion in order to tailor his evidentiary presentation to his changed theory of the hatchet wounds.

(4) Ipsen believed that Sakarias's confession was inadmissible at Waidla's trial and thus did not offer it.

(Report at p. 2.)

Waidla concurs with the referee's report that the prosecutor made an "intentional strategic decision" to pursue inconsistent theories at the successive trials. This intentional choice constitutes prosecutorial misconduct, which violated Waidla's right to due process and the Eighth Amendment.

II. THE PROSECUTOR'S INTENTIONAL USE OF FACTUALLY INCONSISTENT THEORIES IN CAPITAL CASES IS PROSECUTORIAL MISCONDUCT.

This Court has held that it is "prosecutorial misconduct" for a prosecutor to intentionally pursue inconsistent theories at two trials. (See People v. Farmer (1989) 47 Cal.3d 888, 254 Cal.Rptr. 508.) In Farmer, the trial court prohibited counsel from reading a transcript of the prosecutor's argument in a prior trial, which contradicted his arguments in the current trial. This Court affirmed, but warned that intentional inconsistent arguments may constitute "prosecutorial misconduct." (Farmer, 47 Cal.3d at pp. 922-23.) The Court wrote:

> Even if the prosecutor had argued in the Huffman case that the evidence pointed to Huffman's guilt and in the present case that it suggested defendant was guilty, his argument would not be improper as long as it was based on the record and made in good faith. Defendant would have a valid complaint only if he could show that the argument in his case was not justified by the evidence or made in bad faith. Although such a showing might support a claim of

> prosecutorial misconduct, it would not justify reading to the jury allegedly inconsistent argument from another, albeit related, trial.

(Id.)

In People v. Turner (1989) 8 Cal.4th 137, 32 Cal.Rptr. 2d 762, this Court once again considered whether alleged inconsistent arguments in two consecutive trials constituted prosecutorial misconduct. The Court affirmed because it found the prosecutor was consistent in both trials in arguing that the defendant was the "actual killer" and the co-defendant was an aider-and-abettor. (Turner, 8 Cal.4th at p. 194.) However, the Court's discussion suggests that proof of intentional pursuit of inconsistent theories at two trials would be prosecutorial misconduct.

Several federal courts have held that it is "prosecutorial misconduct" for a prosecutor to offer inconsistent theories at two trials. (See Thompson v. Calderon (9th Cir. 1997) (en banc) 120 F.3d 1045, *rev'd on other grounds* Calderon v. Thompson (1998) 523 U.S. 538, 118 S.Ct. 1489; Drake v. Kemp (11th Cir. 1985) 762 F.2d 1449.) In Thompson, the same deputy district attorney prosecuted two defendants for the same murder in separate capital trials. At the first trial, the prosecutor argued that Thompson raped and murdered the victim himself and that the co-defendant, Leitch, only helped to

dispose of the body after he learned of the murder. At the second trial, the same prosecutor argued that Leitch had a motive to kill the victim and that both he and Thompson jointly participated in the murder. (Thompson, 120 F.3d at pp. 1056-57.)

The Ninth Circuit found that the inconsistent theories constituted prosecutorial misconduct that violated due process. The Court wrote:

> From these bedrock principles it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crimes. Then-judge Kennedy wrote for our court that when there are claims of inconsistent prosecutorial conduct, reversal is not required where the underlying theory "remains consistent." Haynes v. Cupp, 827 F.2d 435, 439 (9th Cir. 1987). Here, little about the trials remained consistent other than the prosecutor's desire to win at any cost.

(Thompson, 120 F.3d at pp. 1058-59.)

Similarly in Drake, the same deputy district attorney prosecuted two defendants for the same murder in separate capital trials on inconsistent

theories. (Drake, 762 F.2d at p. 1478.) At the first trial, the prosecutor argued that Campbell committed the murder alone. (Id. at p. 1471.) At the second trial, the same prosecutor argued that Campbell, due to illness, was physically incapable of killing so Drake beat the victim. (Id. at p. 1472.)

In a concurring opinion, Judge Clark found a due process violation and wrote:

> [T]he prosecution's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate that fundamental fairness essential to the very concept of justice. Lisenba v. California, (1941) 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166. . . . The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth.

(Id.)

Several United States Supreme Court justices have expressed concern about prosecutors who employ inconsistent theories to convict defendants in separate trials. In Jacobs v. Scott (1995) 513 U.S. 1067, 115 S.Ct. 711, three

justices dissented from the denial of certiorari in a Texas capital case involving inconsistent theories at separate trials. Justice Stevens wrote:

> (F)or a sovereign State represented by the same lawyer to take flatly inconsistent positions--and to insist on the imposition of the death penalty after repudiating the factual basis for that sentence--surely raises a serious question of prosecutorial misconduct. In my opinion, it would be fundamentally unfair to execute a person on the basis of a factual determination that the State has formally disavowed.

(Id., 513 U.S. at p. 1068.)

The State cites two Court of Appeal decisions, which purportedly endorse the notion that a prosecutor enjoys broad discretion to shift theories at consecutive trials. (People v. Hoover (1986) 187 Cal.App.3d 1085, 231 Cal.Rptr. 203; People v. Watts (1999) 76 Cal.App.4th 1250, 91 Cal.Rptr.2d 1.) This Court has never truly endorsed the rationale of these two lower court opinions. Moreover, the State stretches the holdings of these cases far beyond their intended meaning.

In Hoover, the Court of Appeal stated, "no rule of misconduct or due process binds a prosecutor to a theory asserted in closing argument in a related

prosecution." (Hoover, 187 Cal.App.3d at p. 1083.) However, the court tempered this statement with the following: "Even assuming that fundamental notions of fairness and due process should preclude a prosecutor from asserting diametrically opposed theories in related prosecutions, nothing of the sort occurred here." (Id. at p. 1083.)

In Watts, the Court of Appeal held that a prosecutor can prosecute a defendant for a crime even though another person was previously convicted of that same crime in a prior trial. The panel wrote:

> It has been held that improper governmental conduct warrants dismissal of an information only if it is so grossly shocking and so outrageous as to violate the universal sense of justice. (U.S. v. Doe (9th Cir. 1997) 125 F.3d 1249, 1254.) That standard simply was not met here. Indeed, the evidence adduced at trial, which presumably was available to the prosecutor prior to trial, tends to support the conclusion that the jury in the earlier trial was mistaken. The "universal sense of justice" does not require a prosecutor to forego prosecuting an individual for a crime when there is probable cause to believe he committed that crime just because it also appears

that someone else may have been mistakenly convicted of same crime.

(Watts, 76 Cal.App.4th at pp. 1260-61.)

However, the panel stressed that willful pursuit of inconsistent theories would be different. The panel stated, "[i]t is true that the misconduct of a prosecutor may provide a basis for reversal on due process grounds if the prosecutor, by use of deceptive or reprehensible methods to persuade the court or the jury, rendered the trial fundamentally unfair." (Watts, 76 Cal.App.4th at p. 1261.)

Counsel for Waidla could not find any ethical standard authorizing a prosecutor to shift theories in consecutive trials of two defendants. In fact, the model ethical rules appear to condemn the practice. (See ABA Model Code of Prof'l Responsibility EC 7-13 (1983) ["(T)he accused is to be given the benefit of all reasonable doubt. . .(T)he prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."]; ABA Standards for Criminal Justice, Standard 3-3.9(a) (1993) ["A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. . ."]; ABA Standards for Criminal Justice,

Standard 3-6.1 (a) (1993) ["The prosecutor should not make the severity of sentences the index of his or her effectiveness to the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities."]; ABA Standards for Criminal Justice, Standard 3-6.2 (b)(1993) ["The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."]; Rule 5-220 of the CA State Bar of Prof. Conduct ["A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or produce."].)

Since the prosecutor is an administrator of justice, he also has an ethical duty to conduct himself in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession. (See ABA Model Code of Prof'l Responsibility EC 9-2 (1983) ["When explicit ethical guidance does not exist a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."]; Nat'l Dist. Attorneys Ass'n, National Prosecution Standards, Standard 25.1 (1977) ["To ensure the highest ethical conduct and maintain the integrity of prosecution and the legal system,

the prosecutor shall be thoroughly acquainted with and shall adhere at all times to the Code of Professional Responsibility as promulgated by the American Bar Association and as adopted by the various state bar associations."].)

Applying these legal authorities to this case compels the conclusion that the deputy district attorney engaged in prosecutorial misconduct. The prosecutor's inconsistent theories hardly comport with the lofty ethical standards contemplated by the cases and the ethical rules. There is no excuse for what happened in these two capital trials. While the Waidla trial was the prosecutor's first death penalty case, he was hardly a novice; he had been trying cases for three-and-a-half to four years. (RHRT at p. 7.)

The referee found that the prosecutor's shifting theories in these two capital trials was intentional, not inadvertent. (Report at pp. 2, 26.) Neither the State nor the amicus disputes the referee's factual finding of intent. The State appears to argue that proof of intentional conduct is not enough; there must be some additional showing of "bad faith." The order does not mention "bad faith." The reference to "intentional" suggests this is enough to prove true prosecutorial misconduct.

Moreover, in this case, there is no practical difference between the terms "intentional" and "bad faith." The prosecutor intentionally shifted strategies to gain a litigation advantage at each separate trial that he certainly would not have

enjoyed at a joint trial. This is prosecutorial misconduct regardless of whether it is labeled "intentional" or "bad faith."

The prosecutor's conduct also raises serious questions about the use and exploitation of false evidence. The prosecutor had to believe his theory that Waidla chopped off the top of the victim's head in the living room was false. Indeed, the prosecution had the co-defendant Sakarias's taped confession in which Sakarias admitted to dragging the victim into the bedroom, where he inflicted hatchet chops on her head. This piece of evidence -- which the prosecutor believed was true (RHRT at p. 140) -- refuted the prosecutor's theory at the Waidla trial. Based on Sakarias's confession, he knew that Sakarias, not Waidla, inflicted the hatchet wounds.

The prosecutor testified that he believed Sakarias's confession was inadmissable at the Waidla trial and the referee accepted this explanation as true. (RHRT at pp. 35-37.) However, a prosecutor should not be permitted to bend the truth in a capital trial simply because the evidence that would reveal his falsehood is inadmissable hearsay. The fact remains that the prosecutor knew his theory at the Waidla trial was flatly contradicted by Sakarias's taped confession.

If the prosecutor had questioned the veracity of Sakarias's taped confession, perhaps there would be no impropriety in arguing that Waidla

chopped off the top of the victim's head in the living room. However, the prosecutor believed that Sakarias's taped confession was substantially true. (RHRT at p. 140.) The prosecutor moved Sakarias's taped confession into evidence at the second trial and used it to support his argument for the death penalty. This betrays the willfulness of the prosecutorial misconduct at both trials. The prosecutor continuously changed evidence and arguments to support his current theory.

At the reference hearing the prosecutor testified that it did not matter who actually struck the death blow. (RHRT at pp. 41-45.) The State adopts this argument in its brief, claiming that even if the petitioners have established prosecutorial misconduct, this Court should deny relief for lack of prejudice. But at each capital trial, the prosecutor must have believed that whoever struck the "death blow" mattered because he identified this specific fact as the reason each defendant deserved the death penalty. Again, this reveals the willfulness of the prosecutorial misconduct in this case. The shifting theories directly relate to the shifting closing arguments. This purposefulness is exactly what the Courts have said establishes prosecutorial misconduct.

The State argues that the evidence against Waidla is so overwhelming that he would have been sentenced to death even if no prosecutorial misconduct had occurred. However, the question of whether Waidla should live or die was

a closer question for the jury than the State cares to admit. At the Waidla trial, neither party presented any evidence at the penalty phase; the parties simply proceeded to argument based on the guilt phase evidence. (Waidla RT at p. 3056.) Despite this the jury deliberated about the penalty for eight court-days. (Id. at pp. 3102-24.) At one point, the jury informed the judge that it was "deadlocked." (Id. at p. 3109.) The length of the deliberations and the advisement of a deadlock suggest the penalty phase verdict was a difficult decision. This was a close case. The prosecutorial misconduct may very well have affected the penalty verdict.

3. THE PROSECUTOR'S PRESENTATION OF FALSE EVIDENCE AT TRIAL VIOLATED DUE PROCESS

The United States Supreme Court has held that a prosecutor cannot introduce or argue false evidence. (Miller v. Pate (1967) 386 U.S. 1, 87 S.Ct. 785.) In Miller, a prosecutor introduced and argued expert testimony that spots on the defendant's shorts were the victim's blood even though the prosecutor knew the spots were paint. The Supreme Court reversed the conviction, writing:

The prosecution deliberately misrepresented the truth.

> More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by knowing use of false evidence. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791. There has been no deviation from that established principle. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217; Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed.214; cf. Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9. There can be no retreat from that principle here.

(Miller, 386 U.S. at p. 6.)

This Court has stressed that a prosecutor may not even present expert testimony if he doubts the accuracy of such testimony. (People v. Seaton (2001) 26 Cal.4th 598, 110 Cal.Rptr.2d 441.) In Seaton, the prosecutor failed to disclose that he and two other prosecutors had written memos criticizing a deputy coroner's work and testimony. (Seaton, 26 Cal.4th at p. 648.) This Court found the suppressed memos immaterial and affirmed. However, the Court stressed that a prosecutor cannot present expert testimony that he believes is inaccurate. The Court wrote:

> Notwithstanding the lack of any duty to disclose their internal doubts regarding the accuracy of expert

> testimony when those doubts arise during trial, prosecutors remain under the solemn obligation to present evidence, only if it advances rather than impedes the search for truth and justice. Ordinarily attorneys "may ethically present evidence that they suspect, but do not personally know, is false . . . But the prosecutor is the representative of a sovereignty . . . whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done" (Kyles v. Whitley, supra, 514 U.S. 419, 439, 115 S.Ct 1555, 131 L. Ed. 2d 215), and the prosecutor may not become the "architect of a proceeding that does not comport with [the] standards of justice" (Brady v. Maryland, (1963) 373 U.S. 83, 88, 83 S. Ct 1194, 10 L. Ed. 2d 215). A prosecutor who, before trial, seriously doubts the accuracy of an expert witness's testimony should not present that evidence to a jury, especially in a capital case.

(Id. at pp. 649-50.)

The model ethical rules echo this Court's position. (See ABA Model Rules of Prof'l Conduct Rule 3.3(A)(1) (2002) ["A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false

statement of material fact of law previously made to the tribunal by the lawyer."]; California Bus. & Prof. Code § 6068 [A lawyer shall "never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."]; ABA Model Code of Prof'l Responsibility DR 7-102(A)(4) (1983) [A lawyer "shall not knowingly use perjured testimony or false evidence."]; ABA Model Code of Prof'l Responsibility DR 7-102(A)(5) (1983) [A lawyer "shall not knowingly make a false statement of law or fact."]; ABA Standards for Criminal Justice, Standard 3-5.6 (A) (1993) ["A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity."].)

At the Waidla trial, the prosecutor argued that Waidla chopped off the top off the victim's head, killing her in the living room. In support of this theory, the prosecutor elicited testimony from the medical examiner, Dr. Ribe, that the victim had a post-mortem sacral bruise, suggesting she was already dead when her body was dragged in the bedroom. (Waidla RT at pp. 1631-1633.)

Dr. Ribe filed a declaration in In re Sakarias, the companion habeas case, suggesting that the post mortem sacral bruise was not truly evidence that the victim was already dead before being dragged into the bedroom. (Return to Petition for Writ of Habeas Corpus, Exhibit B.) Thus, it appears the use of

inconsistent testimony through Dr. Ribe continues even now. This is not the first time Dr. Ribe has offered inconsistent or contradictory testimony. (See People v. Salazar (2003) 110 Cal.App.4th 1616, 3 Cal.Rptr.3d 262, 277-78, *review granted,* D.A.R. 12,860 (Nov. 25, 2003) [Finding the L.A. District Attorney's office violated its obligations under Brady v. Maryland (1963) 373 U.S. 83, 83 S.Ct. 1194, for failing to disclose Dr. Ribe's history of inconsistent testimony.].) The inconsistent theories, coupled with Dr. Ribe's inconsistent testimony, suggests the prosecutor's knowing use of false evidence.

At the Sakarias trial, the prosecutor argued that Sakarias dragged the victim into the bedroom, where he killed her by chopping off the top of her head. The prosecutor did not elicit testimony from Dr. Ribe about a post-mortem sacral bruise and he did not introduce the photo of the bruise. The referee found that the prosecutor's omission of this evidence was intentional. (Report at p. 2.)

The referee also found that at the time of the Sakarias trial, the prosecutor did not believe the victim was already dead when she was dragged from the living room to the bedroom. (Report at pp. 2, 27.) This finding, which is consistent with the prosecutor's own testimony, reveals that the prosecutor must have knowingly introduced false testimony at the Waidla trial.

If the prosecutor genuinely believed that the victim was still alive before being dragged into the bedroom, why did he previously argue that Waidla chopped off the top of her head, killing her in the living room? Why did he elicit testimony from Dr. Ribe about a post-mortem sacral bruise, which clearly suggested the victim was dead prior to being dragged into the bedroom?

The only appropriate reason for such a shift would be changed circumstances based on an evolving, more complete investigation. However, the reference hearing revealed that there were no changed circumstances. The investigation was complete before the Waidla trial started. There were no legitimate reasons to change theories between the two trials. The same deputy district attorney tried both cases. The same investigating officers directed the investigation. The same medical examiner testified at both trials. The prosecutor had the same taped statements and the same physical evidence before the start of both trials.

Even if the prosecutor did not intentionally submit false testimony, the prosecution has a constitutional duty to correct evidence he subsequently learns is false. (Jacobs, supra, 115 S.Ct 711; Drake, supra, 762 F.2d 1449; Thompson, supra, 120 F.3d 1045; ABA Model Rules of Prof'l Conduct R. 3.3 (A)(1) (2002) ["A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact of law previously

made to the tribunal by the lawyer."]; ABA Standards for Criminal Justice Standard 3-5.6(A) (1993) ["A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity."].)

In Jacobs, Thompson, and Drake, the prosecutor presented mutually exclusive factual scenarios on the identity of the actual killer. In all three cases, since the murder could have only been committed by one actor, the prosecutor's statements at only one trial could be correct. The prosecution should correct testimony which he subsequently learned was false. For example, in Jacobs, the prosecutor emphasized that Jacobs alone killed the victim to convict Jacobs of capital murder and sentence him to death. In the co-defendant's subsequent trial, the same prosecutor argued that "Hogan is the one that pulled the trigger" by using Jacobs' testimony to assert the truth. (Jacobs, 115 S.Ct. at p. 711.) However, once the prosecutor did that and "was convinced that [Jacobs] was telling the truth," then, the prosecutor had a constitutional duty to correct testimony in the first trial that the State relied upon for a conviction. (Id. at p. 712.)

In this case, the prosecutor did nothing to meet his Brady and ethical duties that arose after he changed theories. At the very least, the prosecutor should have disclosed to Waidla's trial counsel that he was now blaming

Sakarias for chopping off the top of the victim's head even though he had previously argued that Waidla did this. The failure to make a Brady disclosure about the shifting theory reveals intent to manipulate evidence in order to gain a litigation advantage. If the change in theories was an honest development, one would certainly advise counsel from the prior case that the old theory used in the prior case had been discredited.

IV. THE PROSECUTOR'S USE OF FACTUALLY INCONSISTENT THEORIES IS FUNDAMENTALLY INCOMPATIBLE WITH THE EIGHTH AMENDMENT'S "HEIGHTENED STANDARD OF RELIABILITY" IN CAPITAL SENTENCING.

The United States Supreme Court has stressed that the Eighth Amendment requires a heightened standard of reliability in capital sentencing. (Caldwell v. Mississippi (1985) 472 U.S. 320, 105 S.Ct. 2633.) In Caldwell, the Court wrote:

> This Court has repeatedly said under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. California v. Ramos, 463 U.S., at pp. 998-

> 999, 103 S.Ct., at p. 3452. Accordingly, many of the limits this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.

(Id. at p. 329. See also Furman v. Georgia (1972) 408 U.S. 238; Beck v. Alabama (1980) 447 U.S. 625, 100 S.Ct. 2382; Turner v. Murray (1986) 476 U.S. 28, 106 S.Ct. 1683; Sawyer v. Smith (1990) 497 U.S. 227, 110 S.Ct. 2282.)

The focus of the standard has not only been on the fairness of the process, but also on the reliability of the death sentence. The reliability is not judged by looking at the particular case in isolation, but may require examination of other cases or of post-case developments. For example, the Supreme Court found violations of the Eighth Amendment in instances where either there was an apparent risk of an arbitrary sentence, or a sentence was based in part on an aggravating circumstance subsequently held to be invalid, or the prosecutor's argument undermined the reliability of the sentence. (Furman, 408 U.S. 238; Johnson v. Mississippi (1988) 486 U.S. 578, 108 S.Ct. 1981; Caldwell, supra, 472 U.S. 320.) Thus, in determining whether the sentence passes Eighth Amendment muster, the Court has invalidated death judgments when a

post-case event calls into question the accuracy of the information presented to the jury.

Waidla's death sentence fails to meet the heightened reliability standard. First, the evidence at Sakarias's trial calls into question the accuracy of the information presented to the jury in Waidla's penalty trial. Second, in Waidla's penalty phase, the prosecutor relied upon facts he disavowed in Sakarias's trial.

When the prosecutor used evidence at Sakarias's trial that directly contradicted the evidence at Waidla's trial, the prosecutor created reasonable doubt in the information presented to the jury in Waidla's trial. Because the factual scenarios are inherently mutually exclusive, they cannot both be true. The prosecutor established that Sakarias played the larger role in the killing and that the victim died in the bedroom; the prosecutor convinced the jury to accept this factual scenario as the truth. Consequently, Waidla could not have killed the victim in the living room. The evidence cannot be accurate in both trials because the crime could have only occurred in one way: either the scenario the prosecutor asserted at Waidla's trial or the exact opposite scenario at Sakarias's trial. To base a death sentence on inaccurate evidence would result in an arbitrary sentence and thus cannot be upheld under Furman. (Furman, 408 U.S. at p. 238.)

The State tries to minimize the inconsistency by framing the issue as inconsistent arguments, not evidence. However, a prosecutor's argument alone may undermine the reliability of a death verdict. (Caldwell, 472 U.S. at p. 320.) In Caldwell, the prosecutor argued that the appellate courts, not the jury, would ultimately decide whether the defendant deserved the death penalty. The Supreme Court found that the prosecutor's argument diminished the jury's sense of responsibility and thus violated the Eighth Amendment. (Id. at p. 340.) The Court focused on the strength and clarity of the prosecutor's argument to determine whether the argument affected the jury and thus prejudiced a specific right. (Id.) When the argument may have had an effect on the sentencing decision, the Court held that the sentencing decision does not meet the standard of reliability that the Eighth Amendment requires. (Id. at p. 341.) In scrutinizing the extent of the prosecutor's argument and the effect it may have had on the sentencing decision, the Court's reasoning and holding reflects the Court's principal concern of the "procedure by which the State imposes the death sentence" and the importance of heightened reliability. (Id. at p. 340.)

As evident in Caldwell, the Court is extremely concerned with the prosecutor's inappropriate argument prejudicing the jury and producing an unreliable sentencing decision. It follows that when the prosecutor asks a jury

to accept facts that the prosecutor himself has already disclaimed, or will thereafter disclaim, the prosecutor's argument violates the Eighth Amendment.

This gamesmanship is especially troubling at the penalty phase of a capital trial. The jury in Waidla's case was struggling with whether to impose life in prison or death. The State's brief suggests the choice of death was obvious, but the trial transcript belies this. Although neither party presented any evidence at the penalty phase, the jury deliberated for eight court-days. (Waidla RT at pp. 3102-24.) Midway through the deliberations, the jury notified the Court that it was "deadlocked" on the penalty. (Waidla RT at p. 3190.) The Court instructed the jury to deliberate further (Waidla RT at p. 3112), and the jury continued four more days before it reached its death penalty verdict. Against this background, it appears that the question of which penalty to apply was neither easy nor obvious. In such a close case, the prosecutorial misconduct is even more disturbing. Who knows which factor tipped the scales in favor of the death penalty. Who struck the "death blow" may very well have been an important factor in meting out the death penalty.

5. CONCLUSION

For all the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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DATED: November __, 2004

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